IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

## No. 157

R. B. PARDEN ET AL.,
*Petitioners,*

vs.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT ET AL.

## REPLY BRIEF OF PETITIONERS

AL. G. RIVES,
Seventeenth Floor,
Twenty-One Twenty-One Building,
Birmingham, Alabama 35203,
*Attorney for Petitioners.*

TIMOTHY M. CONWAY, JR., and
RIVES, PETERSON, PETTUS & CONWAY,
Seventeenth Floor,
Twenty-One Twenty-One Building,
Birmingham, Alabama 35203,
*Of Counsel for Petitioners.*

E. L. MERRENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

## INDEX



### Cases Cited



### Statutes

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

## No. 157

R. B. PARDEN ET AL.,
*Petitioners,*

vs.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT ET AL.

## REPLY BRIEF OF PETITIONERS

## ARGUMENT

In their reply, petitioners will follow the format of the brief submitted on behalf of respondents:

A

(1)

To the point that the congressional record shows no affirmative intent to include state operated railroads within the FELA, suffice it to say that the subject was not expressly discussed one way or the other, and it appears that the intent was to cover all railroads, without excep-

tion. As was pointed out in *California* v. *Taylor*, 353 U.S. 553, 1 L. ed. 2d 1034, 77 S. Ct. 1037 (the Railway Labor Act case), when congress intended to exclude state employees from the effect of federal statutes, express exemptions were provided. Just as its failure to do likewise in the Railway Labor Act was held to indicate a purpose not to exclude state employees, the same failure here indicates a purpose not to exclude state operated railroad employees from rights under the FELA.

(2)

An effort is made in the opposing brief to gain comfort from the Federal Control Act of 1918, 40 Stat. 451. The purpose of this statute is apparent from a reading of its text, particularly section 10. It did not apply solely to FELA actions, nor was the FELA expressly mentioned therein. It applied to all actions at law or suits in equity, and in effect, placed the federal government in the shoes of the carriers it had seized. It even went so far as to provide that a state court suit, not otherwise removable to a federal court, could not be removed on the ground that the railroad was operated by the federal government, and authorized remanding of any pending actions already removed on that ground. The act did not recognize, as respondents contend, that in the absence of this statute, the federal government was not suable on account of its activities in the operation of such railroads. Its clear purpose was to eliminate doubts and confusion necessarily resulting from federal seizure.

Furthermore, it is submitted that there is no valid comparison between the possible venture of the federal government into the operation of a common carrier enterprise and like action by a state which has delegated to the congress the right to regulate such ventures. Never-

theless, no useful purpose is served by speculating on the result of a FELA suit against the United States if it were to organize its own railroad and thereby commence business as a common carrier. There is no precedent to which one may point, and the attempt to draw this analogy leads to a void, from which no authority provides an exit.

(3)

Next, respondents suggest that Section 6 of the FELA was not designed to confer jurisdiction upon the federal courts to entertain these suits, citing prior use of the phrase "concurrent with that of the courts of the several states," and *Hans* v. *Louisiana*, 134 U.S. 1, 33 L. ed. 842. Again, an inept analogy is drawn because the cause of action asserted in *Hans* was based upon Louisiana's obligations under bonds it had issued. The cause of action asserted did not arise under any statute of the United States whereas the very basis of the suits at bar is a federally created cause of action.

B

(1)

The *Hans*, *Duhne*, and *Fitts* cases, as well as others, are cited by respondents to support the point that a suit may not be brought against a state without its consent, and that general proposition is not disputed but is recognized by petitioners. The distinction between the cases at bar and those relied upon by respondents is that none of the latter involved an attempted enforcement of a federally granted right of action. The suits which were held not maintainable in federal courts as arising under the constitution or laws of the United States simply did not so arise, but involved assertions of non-federal rights, though in some cases, asserted constitutional rights became in-

directly involved. Traditionally, federal question jurisdiction is tested by the question of whether a federal law is an essential element of the plaintiff's case, and if a federal law is merely evidence to prove the validity of plaintiff's right of action or to disprove the validity of a defense, it is not "a case arising under the constitution or laws of the United States." *Gully* v. *First National Bank*, 299 U.S. 109, 81 L. ed. 70, 57 S. Ct. 96. If the federal law merely "lurks in the background" it is not a federal question case, *Gully* v. *First National Bank, supra*, and in cases cited on page 13 of the opposing brief, at best, that was where the federal question lay.

(2)

Opposing counsel have repeatedly referred to state immunity from suit as a constitutional right rather than a right inherent in sovereignty. Petitioners take the position that whether state immunity from suits to enforce other than federally granted rights is based upon the constitution or is inherent in sovereignty is really of no moment here, because regardless which it is, it is unquestioned that a sovereign can voluntarily subject itself to suits. The lack of a state statute or constitutional provision expressly authorizing these suits is not fatal to their maintenance. The sovereign states voluntarily vested in the congress the unrestricted right to regulate interstate commerce, there being no reservation as to states venturing into an interstate commerce business. Efforts of congress to regulate interstate commerce under its exclusive prerogative could be substantially crippled if all states were to enter the railroad or trucking business and avoid the consequences of any regulation under the terms of which they might be brought to court.

(3)

Next, it is contended that congress may not condition the right of a state to engage in interstate commerce upon its relinquishment of immunity from suit. This point is sought to be supported by decisions to the effect that states may not condition the grant of a privilege upon the relinquishment of a constitutional right. It must be borne in mind that the rights involved in the authorities relied upon by respondents were constitutional rights guaranteed to individuals. Immunity from suit is an element of sovereignty, and certain elements of sovereignty were surrendered by all states which adopted the federal constitution. The California State Belt Railroad cases, although restricted in their holdings to the facts before the Court, leave no doubt that such sovereignty as the states may have had was totally surrendered insofar as ventures into interstate railroad businesses are concerned. This is not a congressional regulation of the performance by states of their governmental functions, but a regulation of private enterprise, in which the State of Alabama elected to engage in a proprietary capacity, and thus, the state has placed itself under a federal regulation equally applicable to all like proprietary businesses. The fact that the FELA does not specifically mention state owned railroads is of no aid to the State of Alabama (*United States* v. *California*, 297 U.S. 175, 185, 80 L. ed. 567, 573). If the states had intended to exempt themselves from the power of congress to require railroads to submit to suits as a part of congressional regulation of interstate commerce, such reservation should have been expressed in the constitution.

It is not a matter of this statute requiring a state to relinquish its immunity from suit, as it is a recognition that such immunity was relinquished by the states in the adoption of the constitution delegating to congress the right

to regulate interstate commerce, without reservation of the right of states to engage therein unfettered by federal regulations.

Finally, in *United States* v. *California, supra,* this Court pointed out that the Safety Appliance Act is remedial (so is the FELA) to protect employees from defective appliances (the FELA is to protect employees from defective appliances and negligence), and held that the persons intended to be protected by the act are afforded that protection as against state as well as privately owned carriers which bring themselves within the sweep of the all-embracing language of the statute. The conclusion that the FELA is equally applicable may be avoided by the State of Alabama only by saying that its delegation to congress of the right to regulate interstate commerce was conditional.

C

(1).

Respondents' reliance on the Alabama constitutional provision to the effect that the state shall never be made a defendant in any court of law or equity is paper-thin. This provision of the Alabama constitution is material only if, but for its existence, these causes of action could be maintained. Analyzing the proposition a little further, one comes to the question: Assuming Alabama's Terminal Railway to be subject to FELA suits in the federal courts, could the state, by adopting this phrase in its constitution, thereby exempt itself from liability under the FELA? An affirmative answer would indicate that a state can, by unilateral action, amend the Constitution of the United States by adding a proviso that the right of congress to regulate interstate commerce is limited. Thus, a negative answer to the question becomes obvious.

(2)

As its parting salvo, Alabama has inserted a misleading and inaccurate assertion that a Workmen's Compensation Law for the benefit of its employees, including petitioners, has been enacted and is available. We submit that the state legislature cannot destroy a federally created cause of action by providing for a substitute right and remedy, and this prohibition is expressly set forth in the FELA. 45 U.S.C., § 55. At best, the statutes quoted in Appendices II and III of the opposing brief might be an alternative remedy which petitioners could elect to follow if their claims could be held to fall under the provisions of those statutes. However, claims of the petitioners are excluded by the laws which govern the Alabama State Board of Adjustment. Counsel have cited Title 36, §§ 333 and 334, of the Alabama Code, which establish the State Board of Adjustment and set out its powers and jurisdiction. They failed to cite the statutes which show that petitioners would have no claim before the State Board of Adjustment.

Title 55, § 339, of the Alabama Code (Appendix I hereof) provides that the rules of Chapter 5 of Title 26 of the Alabama Code (the Workmen's Compensation Act of Alabama) as to liability are to be followed in claims for personal injury or death of state employees, and Title 55, § 336 (Appendix II hereof) limits the amounts to be awarded to the amount recoverable in a Workmen's Compensation case. Title 26, § 263, of the Alabama Code (Appendix III hereof) specifies that the Workmen's Compensation Act of Alabama shall not apply "to any common carrier doing an interstate business while engaged in interstate Commerce. . . ."

Again, we think the argument presented by the State of Alabama "cuts the other way." The fact that its stat-

utes which provide a source of compensation for some employees exclude coverage as to petitioners is indicative of an acknowledgment that the remedy of the petitioners lies elsewhere. Further acknowledgment of the applicability of the FELA is found in the book of operating rules governing Terminal Railway employees, where it is recognized that Terminal Railway may be involved in cases under the FELA. (R. 48; Pl. Ex. 4, R. 58)

## CONCLUSION

It appears particularly significant that Alabama does not contend that employees of its Terminal Railway are not under the Federal Employers' Liability Act, and it therefore must be assumed to be conceded that the act does apply. The sole contention is that the rights of petitioners under the act are totally unenforceable. It would be strange indeed if that portion of the act which makes the railroad liable to its employees applies, but that portion which provides for the enforcement of that liability does not. Yet, that is what Alabama asks this Court to hold.

It is not a question of congress stripping a state of its sovereignty, because a portion of that sovereignty had already been surrendered to congress. Nor is it a question of congress conditioning Alabama's right to operate this railroad upon a surrender of its sovereignty (or so-called constitutional immunity from suit), because in delegating congress authority to regulate interstate commerce, such portion of its sovereignty or immunity had already been relinquished. The logic of the opinions in the California State Belt Railroad cases lead directly to that conclusion,

and to the further result that the decisions of the courts below are due to be reversed.

Respectfully submitted,

.....

AL. G. RIVES,
*Attorney for Petitioners.*

TIMOTHY M. CONWAY, JR., and
RIVES, PETERSON, PETTUS & CONWAY,
Seventeenth Floor,
Twenty-One Twenty-One Building,
Birmingham, Alabama,
*Of Counsel for Petitioners.*

**CERTIFICATE OF SERVICE**

I hereby certify that I have mailed a copy of the foregoing reply brief and argument of petitioners, postage prepaid and correctly addressed, to each of the following: Honorable Richmond M. Flowers, Attorney General of the State of Alabama, Montgomery, Alabama and Honorable Willis C. Darby, Jr., Attorney at Law, 307 First National Bank Building, Mobile, Alabama.

This the..... day of February, 1964.

.....

AL. G. RIVES,
*Attorney for Petitioners.*

# APPENDIX

## APPENDIX I.

### Title 55, Section 339

### 1940 CODE OF ALABAMA

### (Recompiled, 1958)

"§ 339. Method of determining award.—When claims are properly prepared and presented to the board of adjustment, and after ascertaining the facts in the case, it is directed to determine the amount of the injury, death or disability or other injury or damage arising from contract or business, and to fix the damages, using as its guide, when applicable, the ordinary rules of negligence and workmen's compensation laid down by the courts and the moral obligation of the state of Alabama and to decree and find the person entitled to payment and the amount, if any, which should be paid and any other facts necessary for a proper adjustment of claims. The ordinary rules of negligence, as to liability, are to be followed in claims by parties not employees of the state of Alabama, or any of its agencies, commissions, boards, institutions or departments. The rules of chapter 5 of Title 26, as to liability, are to be followed in claims for personal injury or death of employees of the state of Alabama, or of any of its agencies, commissions, boards, institutions or departments, and also in claims for the injury or death of convicts. Claims for death shall be made by the personal representative, who shall distribute the proceeds of the claim in the same manner as is provided by law with respect to damages awarded for death by wrongful act. Whenever the provisions of this article authorize ascertainment of the amount of damages and provide for payment of the judgment, finding or award of the board of adjustment, they shall be construed to include also claims arising from

contract or business dealings as well as for personal injury, property damage, death and disability. (1935, p. 1164; 1936-37, Ex. Sess., p. 205.)"

## APPENDIX II.

Title 55, Section 336

1940 CODE OF ALABAMA

(Recompiled, 1958)

"§ 336. Limitation on amount of award for personal injury or death.—The board of adjustment shall not fix a greater amount to be paid on any claim for death or personal injuries than the limits fixed in chapter 5 of Title 26 for injuries, loss of time, medical attendance or death; provided that convicts shall be considered as receiving the minimum wages mentioned in chapter 5 of Title 26. (1935, p. 1164.)"

## APPENDIX III.

Title 26, Section 263

1940 CODE OF ALABAMA

(Recompiled, 1958)

"§ 263. (7543) Articles 1 and 2 of chapter not applicable to certain employments.—Articles 1 and 2 of this chapter shall not be construed or held to apply to any common carrier doing an interstate business while engaged in interstate commerce, or to domestic servants, farm laborers, or persons whose employment at the time of the injury is casual, and not in the usual course of the trade, business, profession or occupation of the employer, or to any employer who regularly employs less than eight employees in any one business or to any county, city, town, village or school dis-

trict. Any employer who regularly employs less than eight employees in any one business or any county, city, town, village or school district may accept the provisions of articles 1 and 2 of this chapter by filing written notice thereof with the department of industrial relations and with the probate judge of each county in which said employer is located or does business, said notice to be recorded by the judge of probate for which he shall receive the usual fee for recording conveyances, and copies thereof to be posted at the places of business of said employers and provided further, that said employers who have so elected to accept the provisions of articles 1 and 2 of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal. In no event nor under any circumstances shall articles 1 and 2 of this chapter apply to farmers and their employees. (1939, p. 1036, § 2, appvd. July 10, 1940.)"